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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1111-A

LEO N. MUNRO, Plaintiff-Appellee,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellant

STATEMENT UNDER RULE 13

The history of the above suit is as follows: On March 16, 1933, a præcipe for the issuance of a summons was filed in the office of the Clerk of the United States District Court for the above District at Buffalo. On the same day a copy of the summons issued pursuant to said præcipe was served on the United States Attorney at Buffalo, New York by the attorney for the plaintiff-appellee. On the same date a copy of said summons was mailed registered, addressed to the United States Attorney General, Department of Justice, Washington, D. C.

On July 26, 1933 a copy of a complaint was served upon the United States Attorney at Buffalo, New York. On February 14, 1934, a copy of an answer was served upon the attorney for the plaintiff-appellee and on the day following the original thereof was filed in the office of the Clerk of the above Court.

[fol. 2] On April 23, 1936 the original of the complaint of the plaintiff-appellee was filed in the office of the Clerk of the above Court.

On November 16, 1934 the defendant served a motion, returnable November 26, 1934, for a dismissal of the complaint and petition of the plaintiff for want of jurisdiction, alleging as the grounds therefor a bar of the limitation as prescribed in Section 19 of the World War Veterans' Act of 1924, as amended.

Affidavits were submitted in opposition to this motion and thereafter the motion was heard before District Judge Harlan W. Rippey, who rendered an opinion denying the motion, and under date of April 29, 1935 an order was entered denying the motion above mentioned.

The case was tried before District Judge John Knight and a jury at a regular term of the United States District Court for the Western District of New York, held at Buffalo, New York, the trial commencing on April 9, 1936 and ending on April 10, 1936; jury returning a verdict in favor of the plaintiff.

At the close of the plaintiff's case and at the close of the entire case, a motion was made on behalf of the defendant for a dismissal of the complaint upon the ground that the alleged cause of action was barred by reason of the limitation prescribed in Section 19 of the World War Veterans' Act of 1924, as amended.

Judgment in favor of the plaintiff was entered July 29, 1936.

[fol. 3] An appeal was taken on behalf of the defendant-appellant under date of September 3, 1936.

There have been no additional parties to the suit nor have any parties been substituted in the action.

The time of the defendant-appellant and the term of Court at which the judgment was entered has been extended by Orders for the purpose of having signed, settled and allowed a Bill of Exceptions and an Order was entered, settling the Bill of Exceptions on October 30, 1936.

IN UNITED STATES DISTRICT COURT, WESTERN NEW YORK

1111-A

LEO N. MUNRO

vs.

UNITED STATES OF AMERICA

DOCKET ENTRIES

Mar. 16, 1933. Filed præcipe for summons.
Mar. 16, 1933. Issued summons and copies.
Sept. 20, 1933. Filed note of issue—Nov. 1933 term.
Feb. 15, 1934. Filed answer.
Feb. 27, 1934. Filed note of issue—Mar. 1934 term.
Aug. 10, 1934. Filed note of issue—Nov. 1934 term.
Jan. 10, 1935. Filed notice of motion and affidavit for dismissal of complaint.

[fol. 4] Feb. 6, 1935. Filed affidavit of atty.
Feb. 6, 1935. Filed plff's memo.
Feb. 6, 1935. Filed deft's memo.
Apr. 13, 1935. Filed Opinion, Rippey, J.
Apr. 29, 1935. Filed order denying motion for order dismissing complaint—Rippey, J.
Apr. 29, 1935. Filed note of issue—May 1935 term.
Jan. 3, 1936. Filed note of issue—Mar. 1936 term.
Mar. 30, 1936. Filed deposition of F. L. Dykema (Notices of filing sent attys. Mar. 31).
Apr. 9, 1936. Trial before Judge Knight and jury.
Apr. 10, 1936. Verdict in favor of plff.
Apr. 17, 1936. Filed stipulation and order ext. time to file bill of exceptions—Knight, J.
Apr. 23, 1936. Filed complaint.
July 15, 1936. Filed order ext. time to file bill of exceptions—Knight, J.
July 29, 1936. Filed judgment—$11,730.00 for plff.—Knight, J.
Aug. 17, 1936. Filed stipulation and order modifying judgment—Knight, J.
Sept. 3, 1936. Filed notice of appeal.
Sept. 3, 1936. Filed petition and order allowing appeal—Knight, J.
[fol. 5] Sept. 3, 1936. Filed assignments of error.
Sept. 3, 1936. Filed Citation with affidavit of service.
Oct. 7, 1936. Filed summons—served Mar. 16/33.
Oct. 9, 1936. Filed order ext. time to file bill of exceptions.

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS

To the above-named Defendant:

You are Hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or if the complaint is not served with this summons to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer,

[fol. 6] judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Simon L. Adler, Judge of the District Court of the United States of America, at the City of Buffalo, in the Western District of New York, and the seal of said Court, this 16th day of March, in the year of our Lord, one thousand nine hundred and thirty-three.

May C. Sickmon, Clerk, by Marguerite M. Wehring, Deputy Clerk. (Seal.)

Alger A. Williams, Plaintiff's Attorney, Office and Post Office Address, Ellicott Square, Buffalo, New York.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE OF SUMMONS

STATE OF NEW YORK,
County of Erie, ss:

Alger A. Williams, being duly sworn, deposes and says that on the 16th day of March, 1933, he served the annexed summons upon the defendant, The United States of America, by delivering to and leaving with Richard H. Templeton, United States District Attorney for the Western District [fol. 7] of New York, a true copy thereof, and that said service was made in the Federal Building in the City of Buffalo, New York, and deponent knows that at the time of such service, said Richard H. Templeton was the United States District Attorney for the Western District of New York, and that at the time thereof, deponent was over the age of twenty-one (21) years.

Alger A. Williams.

Subscribed and sworn to before me this 6th day of October, 1936. Asa M. Williams, Notary Public, Erie County, N. Y.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE OF SUMMONS

STATE OF NEW YORK,
County of Erie, ss:

Margaret R. Galloway, being duly sworn, deposes and says that she resides at Buffalo, New York. That on the

16th day of March, 1933, deponent served the annexed summons upon The United States of America, the defendant in the within action, by enclosing a copy thereof in a securely sealed and duly postpaid wrapper, and by having the same registered and sent by registered mail at the United States Post Office in the City of Buffalo, New York, and by depositing the same in said Post Office, so registered, and that [fol. 8] said envelope and said registered letter was addressed and directed to the United States Attorney General, Department of Justice, Washington, D. C.

Margaret R. Galloway.

Subscribed and sworn to before me this 6th day of October, 1936. Asa M. Williams, Notary Public, Erie County, N. Y.

IN UNITED STATES DISTRICT COURT

COMPLAINT

The plaintiff above named complains of the defendant and for his cause of action alleges:

First. That at all the times hereinafter mentioned the plaintiff was, and now is, a resident of the City of Buffalo, Erie County, New York, and has been a resident thereof for approximately thirteen (13) years.

Second. That on or about the 3rd day of August, 1918, plaintiff duly enlisted in the United States Marine Corps, a branch of the United States Army, for participation in the World War, and upon such enlistment he was assigned to and made a member of the 95th Company, 6th Regiment, of the Marine Corps, and after such enlistment he continued to serve under the War Department of the United States and in the armed forces of the United States and in the United States Army and under the direction, control and [fol. 9] orders of the War Department of the United States, until the 25th day of June, 1919, on which date he was honorably discharged, and at the time of such discharge he was suffering from injuries received in service and from the result of physical impairments and disabilities received and contracted in and during the period of such service,

and that he was disabled during such service in the line of his duty as an enlisted man serving under the War Department of the United States and as a member of the United States Army, and that such disabilities were so contracted and received in France and Germany.

Third. That during plaintiff's service in the United States Army, as aforesaid, the defendant, through its Treasury Department, issued to him for value, a policy of insurance in the amount of Ten Thousand Dollars ($10,000.00), which said policy and the law under which it was issued provided that if the plaintiff should become totally and permanently disabled, all premiums thereon should be waived and suspended, and that plaintiff should receive during such period of disability, the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month, and that the defendant's Certificate number T-4, 092,077, was issued by the defendant to the plaintiff as evidence of said policy of insurance and as a part thereof, and that said policy was issued to and accepted by the plaintiff by and under the authority of an Act of the United States of America, entitled "An Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' ap- [fol. 10] proved September 2, 1914, and for other purposes," which said Act was approved October 6, 1917, and said policy was duly and properly issued and continued in force up to and until the present time and it is now in full force and effect.

Fourth. That upon the discharge of the plaintiff from the armed forces of the United States, as aforesaid, he was totally and permanently disabled as the result of said injuries and physical disabilities received as aforesaid, and that he has continued to be continuously since such time and is now permanently and totally disabled, and that he paid all premiums required to be paid under the terms of said policy up to the time of such total and permanent disability, and that he has paid all premiums required to be paid under the terms and conditions of said policy, and that he has duly complied in each and every respect with all of the terms and conditions required on his part to be performed as an incident or prerequisite to the payment to him of benefits under said policy for total and permanent disability.

Fifth. That plaintiff has duly and properly applied for payments upon said policy of insurance because of said

disability and defendant has refused to pay him anything whatsoever under said policy and he has never received anything in the form of disability payments or otherwise from the defendant under said policy because of such disability or otherwise, and on the 1st day of March, 1933, defendant [fol. 11] by its Director of Insurance definitely rejected the claim of the plaintiff based upon such disability and has refused to pay anything thereon, and that there has been a disagreement and a denial of said claim under and within the meaning of the laws, statutes and rules applicable thereto by said Director of Insurance and by the Director of the United States Veterans Bureau.

Wherefore, plaintiff demands judgment against the defendant for the sum of Ten Thousand Dollars ($10,000.00) and interest on all defaulted monthly installments, and that it be adjudged that the plaintiff is totally and permanently disabled and is entitled to all past, present and future benefits and payments of compensation under said policy of insurance because of his said disability, and that it be adjudged that said policy of insurance is in full force and effect and a valid and existing contract between plaintiff and defendant, and that plaintiff have such other or further relief, or both, as may be just and proper, together with the costs and disbursements of this action.

Alger A. Williams, Attorney for Plaintiff, Office & Post-Office Address, 658 Ellicott Square, Buffalo, New York.

MD.

Verified July 24, 1933.

[fol. 12] Due and Personal service of a copy of the within Complaint and Notice of Entry is admitted this 26 day of July, 1933.

R. H. Templeton, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ANSWER

The defendant herein, by Richard H. Templeton, its attorney, answering the complaint of the plaintiff herein:

First. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations

contained in those paragraphs therein marked "First", "Second", "Third" and "Fifth".

Second. Upon information and belief denies the allegations contained in that paragraph therein marked "Fourth."

Wherefore, defendant demands judgment dismissing the complaint of the plaintiff herein, and further demands an affirmative judgment in favor of the defendant and against the plaintiff for the costs and disbursements of this action.

(S.) Richard H. Templeton, Esq., United States Attorney in and for the Western District of New York, Attorney for the Defendant, Office & Post Office Address, 416 Federal Building, Buffalo, New York.

[fol. 13] *Duly sworn to by Richard H. Templeton. Jurat omitted in printing.*

In United States District Court

Bill of Exceptions—Notice of Motion for Dismissal of Complaint

Please Take Notice that upon the annexed affidavit of Frederick T. Devlin, Special Attorney of the United States Department of Justice, a motion will be made by the defendant at a special term of this Court to be held in the Federal Building at Buffalo, New York on Monday, November 26, 1934 at 10:00 A. M., or as soon thereafter as counsel may be heard, for an order dismissing the petition of the plaintiff [fol. 14] herein, for want of jurisdiction in the Court to hear or determine the cause of action alleged therein.

Dated at Buffalo, N. Y., November 16, 1934.

Yours, etc., Richard H. Templeton, United States Attorney in and for the Western District of New York, and Attorney for the Defendant, Office and P. O. Address, 416 Federal Building, Buffalo, New York.

To Alger A. Williams, Esq., Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF FREDERICK F. DEVLIN

STATE OF NEW YORK,
County of Erie, ss:

Frederick T. Devlin, being duly sworn, deposes and says as follows:

That he is a Special Attorney of the Department of Justice *of* the Defendant herein, and that he has charge of the [fol. 15] defense of the above entitled action.

That an examination by deponent of the official files of the Veterans' Administration, and of the files of the United States Attorney of the Western District of New York discloses as follows:

(1) That the claim for the benefits of a policy of war risk yearly renewable term insurance was filed with the Veterans' Administration May 29, 1931.

(2) That on March 1, 1933 one H. L. McCoy, Director of Insurance, of the Veterans' Administration, wrote the claimant and this plaintiff, setting forth that the claim theretofore made had been denied.

(3) That the petition herein was served upon the United States Attorney July 26, 1933, and was filed in the office of the Clerk of this Court on or about the same date.

That because of the premises, and pursuant to the statutes in such case made and provided, the filing of the petition herein, and the commencement of this action thereby, was barred under the limitation contained in Section 19 of the World War Veterans' Act of 1924, as amended, being Title 38, U. S. C. A., Section 445.

Frederick T. Devlin.

Sworn to before me this 16 day of November, 1934.
John K. Gerken, Notary Public, Erie County, N. Y.

[fol. 16] IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS COMPLAINT

STATE OF NEW YORK,
County of Erie, ss:

Alger A. Williams, being duly sworn, says:

1. I am an Attorney at Law, duly licensed to practice in this Court, and I have been so licensed to practice continuously since prior to March 16, 1933.

2. On or about the 16th day of March, 1933, the above entitled action was referred to me. I was not sure of the proper practice in this case nor of the exact date when the statute of limitations would become effective and I had no time to investigate the law at that time, nor did I have sufficient facts to prepare a complaint or petition, so I telephoned one of the Assistant United States Attorneys for the Western District of New York. I personally know all of these attorneys but I am not sure at the present time which one I talked with, but whomever I talked with advised me that I might serve the summons without the complaint or petition, and that such service would be sufficient to acquire jurisdiction and to toll the running of the statute of limitations, and that thereafter the Government would appear and I might serve my complaint or petition subsequently. I was told in other words that the same practice could be used as would apply in an ordinary New York State Supreme Court proceeding.

[fol. 17] 3. Following this advice and because I was extremely busy, I obtained a summons from the Clerk of this Court in the usual form, and I caused a copy thereof to be served upon the United States Attorney for the Western District of New York on that date, and on the same date I mailed another copy to the United States Attorney General's Office, at Washington, D. C. The copy which was sent to the Attorney General's office was sent by registered mail and according to a receipt which I have in my possession was received and receipted for by the Department of Justice at Washington on March 17, 1933.

4. After the summonses had been served I learned that Frederick T. Devlin, an Assistant United States Attorney

the Western District of New York, was in charge of
e case. I discussed the matter with him personally and
telephone on various occasions and nothing was ever
d about any irregularity of service or of the procedure.
nally I asked him why he had not served a notice of ap-
arance and he said it would not be necessary, that if I
uld serve a complaint or petition upon the local United
ates Attorney's office, that would be sufficient. Accord-
ly I prepared and served a complaint on July 26, 1933,
d on that date the United States Attorney for the West-
n District of New York admitted due and personal service
a copy of said complaint.

5. Some time thereafter a copy was served upon the
ited States Attorney General by mail.

l. 18 6. No objection was ever made thereafter, al-
ough I continued to converse with and discuss the case
h said Frederick T. Devlin, and finally on February
1934, an answer, verified by the local United States At-
ney, was served by the defendant, which was simply in
nature of a general denial and set up no affirmative de-
ses whatsoever. In the meantime in April, of 1933, a
e of issue was filed by me. The case was moved by me
a term commencing in Buffalo in November, 1933, for
other term commencing in March, 1934, and for another
m commencing in November, 1934. Copies of these
ices of trial for each of said terms were received with-
objection by the local United States Attorney, who
nitted personal service of a copy of each of said notices.
the calendar calls the cases were moved but were not
ched and no objection whatsoever was made on the part
the local United States Attorney, except that it might
e been stated by him that the Government was not
dy for trial because of lack of preparation.

. Finally on July 28, 1934, as a result of various other
ferences with said Frederick T. Devlin, and at his sug-
tion, I prepared and delivered to said Frederick T.
vlin, who accepted the same without question or com-
nt, an offer of settlement of the case, and said Frederick
Devlin advised me that the same would be submitted to
proper authorities for consideration, and that he would
ommend the acceptance of the same, and I am informed

[fol. 19] and believe that the same was submitted by him to the proper authorities.

8. On or about November 16, 1934, a motion was made by the defendant to dismiss the complaint or petition herein for want of jurisdiction. That was the first move on the part of the defendant to effect such a result, and it was the first time that the local United States Attorney or the Attorney General or the defendant had taken any such attitude toward the case, although there was ample time after the service of the summons alone for the defendant to move to dismiss the action or to vacate the service, had the defendant or the Attorney General or the local United States Attorney wanted to take this attitude, and said attitude was never intimated or stated in any conferences the deponent has ever had with said Frederick T. Devlin and, in fact, said Frederick T. Devlin has inferred that the case was properly before the Court, that service was regular and that the only question to be decided was that of disability. In the opinion of deponent the attitude of the Government at this very late date was prompted by a review of the file after the plaintiff's offer of settlement had been submitted and after the defendant had reached the conclusion that the case could not be defeated on the merits, and for the first time the defendant sought to escape a just liability upon legal technicalities after having led the plaintiff to believe that the case was properly before the Court [fol. 20] and that the plaintiff was secure in his position and in his conviction that he would sooner or later be awarded a fair trial of the issues of the case.

(S.) Alger A. Williams.

Subscribed and sworn to before me this 18th day of December, 1934. (S.) Manly Fleischmann, Commissioner of Deeds, Buffalo, N. Y.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Portion of Trial

Trial before Hon. John Knight, United States District Judge, and a jury, at the Federal Building, Buffalo, New York, commencing April 9th, 1936, 10:00 A. M.

APPEARANCES

Alger Williams, Esq.

Alexander Chapin, Esq., and Manly Fleischmann, Esq., Ellicott Square Building, Buffalo, N. Y., Attorneys for the Plaintiff.

[fol. 21] Joseph H. San, Esq., Attorney for the Department of Justice, New York City, and Henry W. Killeen, Jr., Assistant United States Attorney, Buffalo, N. Y., for the United States.

ALGER WILLIAMS, called as a witness on behalf of the plaintiff, and sworn, testified as follows:

The Witness: I am the attorney for the plaintiff in this action. This case was referred to me about March 16, 1933, and I was told at that time that there had been a denial by the Director of Insurance. I wanted to get the action started just as soon as I could, because I knew there was a varying limitation on some of these actions. I hadn't at that time sufficient chance to prepare a petition or complaint and I procured a summons and copies of a summons from the Federal clerk at Buffalo, and I served one on that date on one of the assistant attorneys for the Western District of New York. I knew at that time not only the Federal Attorney in this district, but I knew each assistant and I talked with one of those assistants. I can't recall which one it was, but it was the one that I served the summons on. I asked him if that service was proper——

Mr. San: I object to this portion of the testimony.

The Court: Well, of course, Judge Rippey in his de-
[fol. 22] cision in this case, in his opinion in this case, on the motion made, states with reference to the procedure taken in serving the summons in this suit, that this proced-

ure was followed after the plaintiff's attorney was assured by the defendant's attorney that it was in all respects proper to give the Court jurisdiction on the action.

Mr. San: The point is, your Honor, that that motion was decided by the Court upon affidavits, that wasn't upon the testimony during a trial, by which an effort is made to express the method of service. The Court had affidavits before it and that is all the Court's decision was based on. It is generally well known that affidavits very frequently transgress the strict limitations which are placed upon the introduction of testimony during a trial. Now, at a trial that motion might have been decided quite differently by Judge Rippey if he had taken testimony rather than affidavits upon those facts.

The Court: But he based his decision upon the fact that the procedure was approved by the defendant's attorney. On this I am going to exclude the proof. I don't think it is competent. I don't think that the district attorney can bind the Government as to the service.

Mr. Williams: I offer in evidence now this testimony and proof that at that time this service was made upon the [fol. 23] assistant United States District attorney for the Western District of New York.

The Court: March 10th——

Mr. Williams: On March 16th the service of the summons was made. I told him that I wasn't familiar with the practice in these cases and I asked him if I might serve the summons without the petition of complaint. I referred to it as a complaint. I asked if that was proper and it would be proper to institute an action, to toll the running of the Statute of Limitations—this was the thing that bothered me that time. I was told by this Federal attorney that it was proper and that the Government would appear in the action and admit service of my complaint, subsequent to that and within the usual time allowed by the practice of the Supreme Court of the State of New York, and that the Government would follow such practice.

The Court: Is that all?

Mr. Williams: That is on this.

Mr. San: I object to this offering of any testimony.

The Court: Objection sustained.

Mr. Williams: Exception.

Now, on the same date that I served that summons on the Deputy Attorney General I mailed another copy to the

Attorney General's office in Washington by registered mail and I have received a registered mail receipt.

[fol. 24] The Court: I suppose that is not questioned?

Mr. Williams: The registered mail receipt shows that it was received by the Department of Justice on March 17, 1933. After the summonses had been served I learned that Frederick T. Devlin, an Assistant United States District Attorney for this district, was in charge of the case. I discussed the case with him personally and by telephone and on various occasions, and nothing was ever said by him to me about any illegality of service; no criticism was made of the procedure, nor did he tell me in any way that the Court did not acquire jurisdiction, nor that there was any question of jurisdiction raised at that time or would be raised.

Mr. San: I move that that be stricken out.

The Court: I don't think that is very harmful one way or the other.

Mr. San: I will withdraw that.

Mr. Williams: After the time had passed away when I thought that the notice of appearance should have been served, I asked him why he had not served it and he said——

Mr. San: That is objected to.

The Court: All right.

Mr. Williams: Then as to the notice of appearance, he said that it would not be necessary. He said, "You don't [fol. 25] want a notice of appearance. You know you don't need it, so that if you will serve your complaint, at that time I will give you an admission due proof of service on it." According to that, I prepared it and served it.

Mr. San: I object to that.

The Court: Sustained. Exception to the plaintiff.

Mr. Williams: Exception.

I prepared and served the complaint which is before your Honor on July 26, 1933, and on that day due proof of service of the copy of the complaint was admitted by R. H. Templeton, attorney for the defendant. I call your Honor's attention to that admission of service on this original in this case.

The Court: All right.

Mr. Williams: Shortly after that—some time after that it was served on one of the assistant attorneys.

The Court: That was on the attorney's signature?

Mr. Williams: I don't know.

The Court: It appears to be signed.

Mr. Williams: I think it was signed. The admission was given by one of the attorney's assistants. I believe, in the office. Some time after that a copy was mailed to the United States Attorney General at Washington. After that time I continued to converse with Devlin and discussed the case with him. Finally, on September 16, 1934, [fol. 26] an answer was served, which is the answer in this case, and I call your Honor's attention to the fact that it was in the nature of a general denial and no affirmative defenses. In the meantime, on April of 1933 a note of issue was filed by me. The case was moved by me for the term commencing in Buffalo in November of 1933; for another term commencing March, 1934, and for another term commencing in November of 1934. Copies of the notices of trial—each of the notices of trial for each term—were received without objection by the local United States attorney's office and proof of service——

Mr. San: I object to that portion of the statement which says that they were received without objection.

The Court: State that they were mailed.

Mr. Williams: Were served on the local United States attorney's office and the local office admitted personal service of a copy of each of said notices. I attended calendar calls at these terms and I moved this case for trial and the case wasn't reached, although there was, as I recall, some discussion in Court about it. No objection was made at any of these calendar calls on the part of the United States, or on the part of the defendant or any Federal attorney, except this, I believe that at one time Mr. Devlin stated that he was not ready to try the case, but only because it wasn't ready, not because of any other question [fol. 27] involved in the case. On July 28, 1934, after further conferences with Mr. Devlin, and at his suggestion, as a result of one of these conferences, I prepared and delivered to him as Assistant Federal attorney, an offer of the settlement of the case.

Mr. San: That is objected to. Clearly, an attempt to compromise, an offer of settlement, never has been part in the trial of a suit.

The Court: I will sustain the objection on the ground that I have indicated heretofore. Objection sustained. Exception to the plaintiff.

Mr. Williams: Exception. I offer to prove that the offer of settlement was delivered to Mr. Devlin, who advised me that the same would be submitted to the proper authorities for consideration and that he would recommend the acceptance of the same, and after that time the offer was submitted, but was rejected.

Mr. San: That is all objected to.

The Court: Objection sustained. An exception to the plaintiff.

Mr. Williams: Another motion—no criticism, no objection of any kind was ever taken to the complaint, the summons, the procedure or anything else in the case in the nature of a procedural nature.

Mr. San: That is objected to, and may it be stricken out?

[fol. 28] The Court: No, I am going to let that stand.

Mr. Williams: —of which I was informed.

The Court: At what time?

Mr. Williams: Until the 16th of November, 1934.

The Court: I will let that stand.

Mr. San: I respectfully except.

Mr. Williams: At that time a motion was made by the defendant to dismiss the complaint or petition for want of jurisdiction. Now, I would like in closing—I would like to ask, maybe I had better get off the witness stand here now.

The Court: All right. There are no questions to ask, anyway.

Mr. Williams: At the time that this former motion was made it was considered and decided by Judge Rippey and he had before him various affidavits and papers which he considered. Now, I ask your Honor in determining the questions, the motions, in this case to consider the same papers that were before Judge Rippey—both in behalf of the Government and in behalf of the plaintiff.

The Court: Well, I don't think those affect our position, at all. I think the proceedings before Judge Rippey are a matter of record in the case.

Mr. Williams: That is true.

[fol. 29] The Court: I don't think I wish to do that. I don't think I should consider those affidavits on this motion. As a matter of fact, we are offering evidence here and

applying the question of the Statute of Limitations—it is clear what the point is here.

Mr. Williams: Well, I just want to get a ruling on that.

The Court: I decline to do that.

Mr. Williams: May I have an exception? Now, then, I offer in evidence——

The Court: I don't mean by that that all the papers and also those things are before me. I am speaking about the affidavits,——

Mr. Williams: That is right.

The Court: That motion I declined to review.

Mr. Williams: I now offer in evidence—I offer to produce the original if there is any question—of my affidavit of December 18, 1934, which was given to and considered by Judge Rippey on the Government's motion to dismiss, the motion I mentioned before.

Mr. San: That is objected to.

The Court: Objection sustained. An exception to the plaintiff.

Mr. Williams: Well, is the objection on the ground that it is not the original?

Mr. San: No.

Mr. Williams: You don't raise that question? I take an exception and ask to have this affidavit marked for identification.

[fol. 30] (Affidavit of Mr. Alger Williams, dated December 18, 1934, received as Plaintiff's Exhibit No. 19 for Identification.)

Cross-examination.

By Mr. San:

Q. In March, 1933, when the summons was served in this action did you know under what act the suit was authorized in behalf of the plaintiff suing for the benefit of War Risk Insurance Policy?

A. No, I didn't. I thought it was under the War Risk Insurance Act.

Q. Did you prior to the service of the summons—did you make any effort to look up and find out what law applied to the suit which you were about to commence?

A. No.

Mr. San: That is all.
The Court: That is all.

(Proceedings adjourned until tomorrow, April 10, 1936, at 10:00 A. M.)

Mr. Williams: The plaintiff rests.

MOTIONS TO DISMISS

Mr. San: I move, your Honor, to dismiss the action on the ground that the plaintiff has failed to make out a prima facie case and also on the ground that the suit was not commenced within the time provided for in Section 19 of the World War Act.

The Court: Motion denied.

Mr. Williams: That is all. We rest, your Honor.

[fol. 31] The Court: Anything further?

Mr. San: I now renew the motion to dismiss the complaint on the grounds set forth at the end of the plaintiff's case.

The Court: Same disposition. I will deny it and leave it to the jury.

Mr. San: Exception.

IN UNITED STATES DISTRICT COURT

George L. Grobe, (Frank Devlin), United States Attorney, for the Government for motion.

Alger A. Williams and Manly Fleischmann, for plaintiff opposed.

OPINION ON MOTION TO DISMISS COMPLAINT

RIPPEY, D. J.:

This is an action brought on a policy of War Risk Insurance. Plaintiff is a resident of the Western District of New York; thus the suit is brought in the right district. Congress has conferred jurisdiction on this Court over the subject matter of the action (38 U. S. C. A. 445). Thus, the jurisdiction of this Court is exclusive (U. S. v. Pfitsch, 256, U. S. 547, 552).

Sec. 445 of Title 38 U. S. C. A. also provides that "The procedure in such suits shall be the same as that provided [fol. 32] in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable." Section 762 provides, so far as applicable, that "The plaintiff in any suit brought" * * * "shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides." Sec. 763 provides, among other things, that "The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter."

Despite the following facts, defendant moves to dismiss the suit for want of jurisdiction. On March 16, 1933, a summons was procured by plaintiff from the clerk of this court in due form and served on the District Attorney for the Western District of New York and on the same day a copy was mailed to the Attorney General of the United States by registered mail and received by him on March 17, 1933. No complaint or petition was served with the summons. Time for commencement of the suit expired on April 5, 1933 and up to that time no complaint or petition had been served. Service of a summons under the law of the State of New York constitutes the commencement of an action (see 16 C. P. A.), and the issuance by the clerk of the writ or summons under seal and its service according to State [fol. 33] practice is the commencement of the action under Federal practice (28 U. S. C. A. 721, 722) under the Conformity Act. This procedure was followed after plaintiff's attorney was assured by the District Attorney that it was in all respects proper to give the court jurisdiction of the action. Complaint was personally served on the United States Attorney on July 26, 1933 and due and personal service admitted and a copy was duly served on the United States Attorney General by registered mail. On February 16, 1934 an answer, duly verified by the U. S. Attorney, was served on the attorney for plaintiff. It raised no question of jurisdiction and contained no defense that the statute of limitations had run before the service of the complaint. The case was on the November, 1933,

and March and November, 1934 calendars of this court for trial without objection. Down to the time of the making of this motion no objection has been made by defendant to the regularity of the proceedings. It is now too late.

A complaint or petition was served in the manner and upon the persons required by Sections 762 and 763, Title 28, U. S. C. A. and the government appeared and answered to the merits. The time limitation within which the suit could be brought was an affirmative defense. To take advantage of failure to commence the action in time the government was required to plead it affirmatively (N. Y. C. PA.) 242: Rodger v. Bliss, 130 Misc. 168, 223 Supp. 401. This it has not done.

[fol. 34] Whether there were defects in the commencement of the suit is immaterial. The provisions of Sections 762 and 763 were purely procedural and not jurisdictional and the government could and did waive any such defects by its general appearance and answer to the merits (Little v. U. S., 54 Fed. (2d) 711: Farrar & Brown v. U. S., 3 Peters (28 U. S.) 459; Thames & Murray, Ins. Co., 237, U. S. 19, 24; U. S. v. N. Y. & O. S. S. Co., 216 Fed. 61; U. S. v. Hooslof, 237 U. S. 19, 24; Everett Ry. Co. v. U. S., 236 Fed. 806; Buckley v. Reid, 133 Fed. 696; Mackay & Uinta Co., 229 U. S. 173.)

The motion must be denied and it is so ordered.

Dated, April 11th, 1935.

Harlan W. Rippey, U. S. D. J.

In United States District Court

Order Denying Motion to Dismiss—April 25, 1935

Present: Hon. Harlan W. Rippey, District Judge.

The defendant herein having heretofore moved this Court for an order dismissing the petition of the plaintiff herein, [fol. 35] for want of jurisdiction in the Court to hear and determine the cause of action alleged in said petition, and said motion having come on to be heard, and due deliberation having been had, and both parties having submitted Briefs, and on reading and filing the notice of motion dated November 16, 1934, the affidavit of Alger A. Williams veri-

fied the 18th day of December, 1934, the summons, petition and answer herein and all the other proceedings had herein, and after hearing Frederick T. Devlin, Special United States Attorney, in support of said motion and Alger A. Williams, by Manly Fleischmann of counsel, in opposition thereto; Now, on motion of Alger A. Williams, it is

Ordered that the defendant's motion be, and the same hereby is, in all respects denied.

Harlan W. Rippey, Judge, United States District Court.

IN UNITED STATES DISTRICT COURT

JUDGMENT

The above entitled action having duly come on for trial before the Honorable John Knight, United States District Judge and a jury, at the Federal Building, in Buffalo, on the 9th day of April, 1936, and the trial of the issues herein having continued until April 10th, 1936, at which time said issues were submitted to the jury for determination, and the jury having returned a verdict of "cause of action" [fol. 36] in favor of the plaintiff and against the defendant, and the defendant's motion to dismiss the complaint which was made just prior to the production of any testimony having been denied, and the defendant's motion to dismiss the complaint made at the conclusion of the plaintiff's case having been denied, and the defendant's motion to dismiss the complaint and for a directed verdict at the conclusion of all of the evidence having been denied, and the defendant's motion to set aside the verdict after the rendition thereof having been denied, and it appearing from the evidence that the plaintiff held defendant's certificate T-4,092,077 evidencing a policy of War Risk Insurance and that plaintiff became totally and permanently disabled on or before the 1st day of July, 1919, and said verdict having been returned during the said month of April, 1936;

Now, Therefore, on motion of Alger A. Williams, attorney for the plaintiff, and upon all of the pleadings and proceedings had and filed herein, it is

Ordered, Adjudged and Decreed, that the plaintiff have, and is hereby granted, judgment against the defendant for

the sum of $11,730.00, and that the fees of the said Alger A. Williams, attorney for said plaintiff, are hereby fixed at ten per cent (10%) of such amount and of all further payments to plaintiff under the policy in suit, and that said Alger A. Williams as such attorney have, and he is hereby given a lien on said sum so awarded to the plaintiff to the [fol. 37] extent of $1,173.00, and ten per cent (10%) of all such further payments, and that said sums may be paid directly to him with the same effect as though paid directly to the plaintiff.

Dated, July 17, 1936.

(Sgd.) John Knight, District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

SIRS:

You Will Please Take Notice that the defendant in the above entitled action hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from a judgment of this Court in favor of the plaintiff, entered in the office of the Clerk of the District Court of the United States for the Western District of New York, on the 29th day of July, 1936, and from each and every part of said judgment.

Dated, Buffalo, New York, September 3, 1936.

(S.) George L. Grobe, United States Attorney in and for the Western District of New York, Attorney for Defendant, Office & Post Office Address, 416 Federal Building, Buffalo, New York.

[fol. 38] To Alger A. Williams, Attorney for Plaintiff, 664 Ellicott Square Building, Buffalo, New York, and to May C. Sickmon, Clerk, District Court of the United States, for the Western District of New York.

IN UNITED STATES DISTRICT COURT

PETITION AND ORDER ALLOWING APPEAL

The United States of America, defendant above named, a sovereign corporation, by George L. Grobe, United States Attorney for the Western District of New York, its attor-

ney, feeling aggrieved by the judgment of this Court, made and entered in the above entitled action in the office of the Clerk of the District Court of the United States for the Western District of New York on the 29th day of July, 1936, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in the accompanying Assignments of Error, forming a part hereof, and the defendant therefore prays that this, its petition for appeal, may be allowed, and that a transcript of the records in the proceeding herein, upon which said judgment was based and entered, may be transmitted with this appeal to the said United [fol. 39] States Circuit Court of Appeals for the Second Circuit.

Dated, Buffalo, New York; September 3, 1936.

George L. Grobe, United States Attorney for the Western District of New York, Attorney for the Defendant.

The foregoing petition is hereby allowed and it is so Ordered.

Dated, Buffalo, New York, September 3, 1936.

John Knight, United States District Judge.

Citation, in usual form, omitted in printing.

[fol. 40] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

Now comes the defendant above named by its attorney, George L. Grobe, United States Attorney for the Western District of New York, and makes and files the following Assignments of Error upon which it will rely for the prosecution of its appeal from the judgment of this Court, made and entered in the office of the Clerk of the United States District Court for the Western District of New York, on the 29th day of July, 1936.

1. The District Court of the United States erred in making and entering its order in the above styled suit, filed April 29, 1935, which said order denied a motion of the

defendant filed November 16, 1934 for a dismissal of the petition of the plaintiff for want of jurisdiction to hear and determine the cause of action alleged in the petition and which said motion was made upon the ground that the alleged cause of action set forth in the petition was barred [fol. 41] under the limitation contained in Section 19 of the World War Veterans' Act of 1924 as amended, Title 38, U. S. C. A., Section 445.

2. The District Court of the United States erred in denying the motion of the defendant for a dismissal made at the close of the plaintiff's case upon the ground that the suit was not commenced within the time provided for in Section 19 of the World War Veterans' Act.

3. The District Court erred in denying the motion of the defendant, made at the close of the entire case, for a dismissal of the complaint upon the same grounds set forth in support of the same motion made at the close of the plaintiff's case, namely, that the suit was not commenced within the period or time prescribed by Section 19 of the World War Veterans' Act.

Wherefore, the defendant prays for a reversal, with costs, of the judgment of the District Court of the United States for the Western District of New York, made and entered in the above entitled case on the 29th day of July, 1936, and for such other and further relief as to the Court may seem just.

Dated, Buffalo, New York, September 3, 1936.

George L. Grobe, United States Attorney in and for the Western District of New York, Attorney for the Defendant, Office and Post Office Address, 416 Federal Building, Buffalo, New York.

[fol. 42] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER EXTENDING TERM—April 16, 1936

It is Hereby Stipulated by and between the attorneys for the parties to the above entitled action, that an Order may be made and entered herein without further notice, extending the regular term of the United States District Court for the Western District of New York, held in and

at the City of Buffalo, in said District, commencing on March 10th, 1936, for ninety days from the date herein, for the purpose of having allowed, settled and signed a Bill of Exceptions in the above styled action, and further providing that the time within which the Defendant herein may have signed, settled and allowed a Bill of Exceptions is extended to ninety days from the date herein.

Dated April 16, 1936.

(S.) Alger A. Williams, Attorney for Plaintiff.
(S.) George I. Grobe, Attorney for Defendant, by Henry W. Killeen, Jr., Ass't U. S. Attorney.

It is so Ordered. (S.) John Knight, United States District Judge.

[fol. 43] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER EXTENDING TERM—July 14, 1936

It is Hereby Stipulated by and between the attorneys for the parties to the above entitled suit that an Order may be entered without further notice extending the time of the defendant, within which it may have settled, signed and allowed a Bill of Exceptions, 90 days from the date hereof and further extending the March, 1936, term of United States District Court for the Western District of New York, at which term the above styled suit was tried, 90 days from the date hereof for the same purpose.

Dated July 14, 1936.

Alger A. Williams, Attorney for Plaintiff. George L. Grobe, Attorney for Defendant, by Joseph J. Doran, Asst. U. S. Attorney.

It is so Ordered. John Knight, United States District Judge.

[fol. 44] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER EXTENDING TERM—October 9, 1936

It is Hereby Stipulated, by and between the attorneys for the parties to the above entitled suit, that an order may be entered without further notice extending the time of the defendant within which it may have settled, signed and

allowed a Bill of Exceptions ninety days from the date hereof, and further extending the Term of Court at which said judgment was rendered and entered, for that purpose, ninety days from the date hereof.

Dated October 9, 1936.

(S.) Alger A. Williams, Attorney for Plaintiff.

(S.) George L. Grobe, Attorney for Defendant.

It is so Ordered. John Knight, United States District Judge.

In United States District Court

Stipulation and Order Settling and Allowing Bill of Exceptions

It is Hereby Stipulated and Agreed by and between the [fol. 45] attorneys for the respective parties to the above entitled action that the foregoing Bill of Exceptions contains the evidence given on the trial of this case as agreed upon by the parties for the purpose of having settled and allowed a Bill of Exceptions, and that it is correct in all respects, and that the same further contains the rulings of the District Judge presiding at the trial of the above cause and the Exceptions taken by the parties to such rulings as agreed upon, and that the same may be allowed, settled and ordered filed.

Dated, Buffalo, New York, November 5, 1936.

Alger A. Williams, Attorney for Plaintiff. George L. Grobe, Attorney for Defendant.

Upon the foregoing Stipulation, and on motion of George L. Grobe, attorney for the defendant, I hereby sign, settle and allow the foregoing as and for the defendant's Bill of Exceptions, and order the same to be filed.

Dated, November 5, 1936.

John Knight, U. S. D. J.

[fol. 46] In United States District Court

Stipulation and Order as to Record

It is Hereby Stipulated by and between the attorneys for the parties herein that the foregoing Record contains all of

the papers, evidence and exhibits necessary for the determination of this appeal, as agreed upon by counsel for the parties, with the reservation that either party may submit the originals or photostatic copies of any or all exhibits received in evidence at the trial of the cause.

Dated, Buffalo, New York, November 5, 1936.

Alger A. Williams, Attorney for Plaintiff. George L. Grobe, Attorney for Defendant.

On reading the foregoing consent of the attorneys for the respective parties hereto, it is

Ordered that the foregoing printed Record be filed in lieu of the original papers for the purpose of certifying a Record on Appeal.

Dated, November 5, 1936.

John Knight, U. S. D. J.

[fol. 47] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 48] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued March 15, 1937. Decided April 12, 1937

No. 251

LEO N. MUNRO, Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, Defendant-Appellant

Appeal from the District Court of the United States for the Western District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Appeal by the United States from a judgment for the plaintiff in an action upon a contract of war risk term insurance. Judgment reversed.

Julius C. Martin, Director, Bureau of War Risk Litigation, of Washington, D. C. (George L. Grobe, U. S. Atty., of Buffalo, N. Y., Joseph J. Doran, Asst. U. S. Atty., of Rochester, N. Y., Julius C. Martin, Director, Bureau of War Risk Litigation, of Washington, D. C., and Wilbur C. Pickett and Fendall Marbury, Sp. Assts. to Atty. Gen., on the brief), for the United States.

Alger A. Williams, of Buffalo, N. Y. (Charles H. Kendall, of Buffalo, N. Y., of counsel) for appellee.

SWAN, Circuit Judge:

This is an action upon a contract of war risk term insurance brought in the District Court. Before the case was reached for trial the defendant moved for dismissal upon the ground that suit had not been commenced within the time prescribed by section 19 of the World War Veterans' Act of 1924, as amended; 38 U. S. C. A. §§ 445, 445d. This motion was overruled by Judge Rippey. Munro v. United States (D. C.) 10 F. Supp. 412. At the trial the motion was renewed before Judge Knight, who, following Judge Rippey, properly denied it. The correctness of these rulings is the only question presented by the appeal.

The plaintiff concedes that under the statute the action had to be brought not later than July 1, 1933. The facts

giving rise to the dispute whether it was so brought are the following: On March 16, 1933, a præcipe for the issuance of a summons was filed in the office of the clerk of the District Court, and on the same date a copy of the summons issued pursuant thereto was served upon the United States attorney in Buffalo, and another copy was sent by registered mail to the Attorney General in Washington, D. C.; but no copy of the complaint was served upon the United States attorney until July 26, 1933, and the original of the complaint was not filed in the office of the clerk of the court until April 23, 1936, after the trial. On February 15, 1934, the United States attorney filed the defendant's answer without raising any question as to the timeliness of the suit, but about a year later moved to dismiss for lack of jurisdiction. This was the motion which Judge Rippey overruled. The trial was had in April, 1936, and judgment was entered July 29, 1936. In following the above-described procedure the plaintiff's attorney acted upon information obtained from an assistant United States attorney who told him that service of the summons would be sufficient to give the court jurisdiction and toll the statute of limitations and that the [fol. 49] complaint or petition might be served subsequently.

The questions thus presented are two: First, whether procuring a summons, serving a copy thereof on the United States attorney, and sending a copy to the Attorney General by registered mail constituted a commencement of suit against the United States; and, second, if it did not, whether the United States has waived the defense that the suit was not brought within the time specified by section 19 of the World War Veterans' Act of 1924 as amended.

Said section 19 as amended by the Act of July 3, 1930 (46 Stat. 992, 38 U. S. C. A. § 445), provides that an action on a war risk insurance claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the federal District Court for the district in which the claimant resides. It also provides that "the procedure in such suits shall be the same as that provided in sections 5 and 6 [sections 762 and 763 of Title 28]" of the Tucker Act of 1887, "and section 10[1] thereof [section 765

[1] Section 10 (see 28 U. S. C. A. § 765) is thought not pertinent to the present discussion.

of Title 28] in so far as applicable." Section 5 of the Tucker Act says that the plaintiff "shall file a petition" with the clerk of the court in the proper district, containing, among other things, a succinct statement of the facts on which the claim is based, and section 6 says he shall cause a copy of his petition filed under the preceding section to be served upon the district attorney and shall mail a copy, by registered letter, to the Attorney General. 24 Stat. 506, 28 U. S. C. A. §§ 762, 763. It is obvious that these provisions were not complied with before July 1, 1933. Indeed, the requirement that a copy of the petition be mailed to the Attorney General does not appear to have been complied with at any time—although this might not be fatal if the other requirements were fulfilled. Cf. Little v. United States, 54 F. (2d) 711 (D. C. W. D. La.)

The appellant contends that the procedure prescribed by sections 5 and 6 of the Tucker Act (28 U. S. C. A. §§ 762, 763) are mandatory in prescribing how personal jurisdiction over the United States shall be obtained in an action brought in the District Court; while the plaintiff urges that the Conformity Act (28 U. S. C. A. § 724) makes applicable the procedure of the New York Civil Practice Act, pursuant to which actions are begun by service of summons. To the plaintiff's argument it may be answered that, literally, the Civil Practice Act does not, and could not, provide any method of suing the United States, or of serving a summons upon the United States. Upon a broader basis it may be answered that, when the United States consents to be sued, it may impose such restrictions upon the manner of bringing suit as it sees fit (Reid v. United States, 211 U. S. 529, 538, 29 S. Ct. 171, 53 L. Ed. 313), and that the reference to sections 5 and 6 of the Tucker Act, specifically designating the procedure to be followed in a suit based on a war risk insurance contract, precludes the adoption of any other. As an original question, we should entertain no doubt that this is the correct conclusion and that the suit cannot be deemed to have been "brought" until, at the least, a copy of the petition was served on the district attorney.

The authorities are in some confusion. The greater number of decisions, and in our opinion the better reasoned, support the view above expressed. In several, it has been held that service of a summons upon the district attorney is an unauthorized method of beginning suit against the

United States, and motions to quash the service have been granted. National Casket Co. v. United States, 263 F. 246 (D. C. S. D. N. Y.); Cassarello v. United States, 265 F. 326 (D. C. M. D. Pa.); Reid Wrecking Co. v. United States, 202 F. 314 (D. C. N. D. Ohio); Whalen Paper & Pulp Mills v. Davis, 53 App. D. C. 84, 288 F. 438; Miller v. United States, 11 F. Supp. 924 (D. C. W. D. N. Y.). In others, where the question was the same as in the case at bar, namely, whether the action was brought in time, it has been held directly or by intimation that the procedure of sections 5 and 6 of the Tucker Act (28 U S. C. A. §§ 762, 763) must be followed. Walton v. United States, 73 F. (2d) 15 (C. C. A. 8); Tyson v. United States, 76 F. (2d) 533 (C. C. A. 4), affirmed 297 U. S. [fol. 50] 121, 56 S. Ct. 390, 80 L. Ed. 520; Creasy v. United States, 4 F. Supp. 175, 179 (D. C. W. D. Va.); Spencer v. United States, 14 F. Supp. 46, 47 (D. C. D. Mass); Henry v. United States, 15 F. Supp. 651 (D. C. M. D. Pa.). On the other hand, Judge Dickinson held in Mill Creek & M. N. & R. Co. v. United States, 246 F. 1013 (D. C. E. D. Pa.), that a suit for recovery of illegally collected taxes was timely brought against the United States by the issuance of a summons and service thereof on the district attorney in accordance with Pennsylvania practice. This decision was cited with approval by Judge Knox in Bennett Day Importing Co. v. United States, 8 F. (2d) 83 (D. C. S. D. N. Y.), and Judge Rippey reached the same result in the case at bar and in Miller v. United States, 13 F. Supp. 684 (D. C. W. D. N. Y.). Upon a direct writ of error to the Supreme Court, Judge Dickinson's decision was affirmed in a per curiam opinion, United States v. Mill Creek & M. H. N. & R. Co., 251 U. S. 539, 40 S. Ct. 118, 64 L. Ed. 404; but we think that such affirmance must be construed only as a holding that the District Court had jurisdiction of the subject matter of the suit without consideration of the question whether the United States had been properly brought into court before the statute of limitations had run. This follows from the fact that affirmance was upon the authority of United States v. Larkin, 208 U. S. 333, 28 S. Ct. 417, 52 L. Ed. 517. There a direct writ of error brought up a judgment of a District Court dismissing an information for the forfeiture of smuggled jewels on the ground that no lawful seizure of the jewels had been made within the Cleveland district. It

was held that a controversy whether there had been a lawful seizure in that district did not involve the jurisdiction of the District Court as a federal court. Hence the case was appealable to the Circuit Court of Appeals, and, since an appeal had already been taken to that court, the writ of error was dismissed without considering the validity of the seizure. Therefore we conclude that the affirmance of the Mill Creek Case has not settled the question with which we are presented; and for the reasons and on the authorities above mentioned we hold that the plaintiff did not bring his action within the time required by section 19 of the World War Veterans' Act as amended.

It remains to consider whether the delay was waived by the statement of an assistant district attorney that service of a summons would toll the statute, or by the filing of an answer of general denial after the copy of the petition had been served upon the district attorney. The answer must be in the negative. When Congress requires a suit against the United States to be brought within a specified time, the time limitation is a condition upon the court's jurisdiction and operates as a bar to judgment without being pleaded. Finn v. United States, 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128. It may not be abrogated by estoppel, nor waived. Lynch v. United States, 80 F. (2d) 418 (C. C. A. 5), certiorari denied 298 U. S. 658, 56 S. Ct. 683, 80 L. Ed. 1384; United States v. Trollinger, 81 F. (2d) 167 (C. C. A. 4); United States v. Valndza, 81 F. (2d) 615 (C. C. A. 6); Henry v. United States, 15 F. Supp. 651 (D. C. M. D. Pa.); Spencer v. United States, 14 F. Supp. 46 (D. C. D. Mass.). The cases relied upon by the plaintiff to establish waiver are manifestly different. Most of them relate to matters of venue, as in United States v. Hvoslef, 237 U. S. 1, 35 S. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286, and United States v. New York & O. S. S. Co., 216 F. 61 (C. C. A. 2). We do not think that United States v. Ellison, 74 F. (2d) 864, at page 869 (C. C. A. 4), certiorari denied 295 U. S. 750, 55 S. Ct. 829, 79 L. Ed. 1695, contradicts our conclusion, for the court seems to have assumed that, if the issue of timeliness had been raised, the paintiff could have proved his right to sue. Compare the later decision by the same court in United States v. Trollinger, 81 F. (2d) 167.

For the foregoing reasons, the judgment must be, and is, reversed and the cause remanded.

[fol. 51] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of April, one thousand nine hundred and thirty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

LEO N. MUNRO, Plaintiff-Appellee,

vs.

UNITED STATES, Defendant-Appellant

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and cause remanded for a new trial.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 52] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Leo N. Munro vs. United States. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 19, 1937. William Parkin, Clerk.

[fol. 53] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 52, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Leo N. Munro,

Plaintiff-Appellee, against United States, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-sixth day of June, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

D. E. Roberts, Deputy Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 54] Supreme Court of the United States

Order Allowing Certiorari—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,699. U. S. Circuit Court of Appeals, Second Circuit. Term No. 218. Leo N. Munro, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 15, 1937. Term No. 218, O. T., 1937.